SUPREME COURT, U. S.

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No. 657

IN THE

Supreme Court of the United States

OCTOBER TERM 1968

SAN JACINTO SAND COMPANY, INC.,
Petitioner,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE 14TH SUPREME JUDICIAL DISTRICT OF TEXAS AT HOUSTON, TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION

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FIDELITY PRINTING COMPANY, INC., HOUSTON

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BRIEF FOR RESPONDENT IN OPPOSITION

To the Honorable Supreme Court of the United States:

Respondent, Southwestern Bell Telephone Company, files this Brief in Opposition to the Petition for Writ of Certiorari filed by San Jacinto Sand Company, Inc., to review the judgment of the Court of Civil Appeals for the 14th Supreme Judicial District of Texas (426 S.W. 2d 338, writ refused, no reversible error, Order of the Supreme Court of Texas, July 10, 1968; Motion for Rehearing overruled by Order of the Supreme Court of Texas, July 24, 1968.)

OPINIONS BELOW

The statement of petitioner concerning the opinions below is correct except that the Order of the Supreme Court of Texas denying Petitioner's Application for Writ of Error to the Court of Civil Appeals for the 14th Supreme Judicial District of Texas was entered by order of the Court dated July 10, 1968.

JURISDICTION

This Court does not have jurisdiction to review the decisions below because the petitioner did not timely raise and preserve its contention that its rights under the Fourteenth Amendment of the United States Constitution had been violated. Until petitioner filed its First Amendment to Application for Writ of Error in the Texas Supreme Court, petitioner had never referred to the federal constitution. Petition at 21A-22A, Appendix C. Petitioner's references to "unconstitutional" action are assumed to refer to the Texas Constitution and rights thereunder rather than to the Federal constitution. *E.g., New York ex rel Bryant* v. *Zimmerman,* 278 U.S. 63, 67-8 (1928). Likewise, petitioner's references to "due process" are assumed to be referable only to the Texas Constitution.[1] *E.g., Bowe* v. *Scott,* 233 U.S. 658, 664-5 (1914).

Petitioner's so-called federal question was not timely raised. Its first reference to federal constitutional rights was made in its First Amendment to Application for Writ

[1] The term "due course of the law of the land" found in Article I, section 18 of the Texas Constitution is synonymous with the term due process. Typically the Texas courts refer to the state constitutional right as the right to due process. *E.g., Mellinger* v. *City of Houston,* 68 Tex. 36, 3 S.W. 249 (1887); *Masonic Grand Chapter of Order of Eastern Star* v. *Sweatt,* 329 S.W. 2d 334 (Tex. Civ. App. 1959, writ ref'd n.r.e.); *Cantu* v. *Parr,* 338 S.W. 2d 183 (Tex. Civ. App. 1960, error dism'd w.o.j.).

of Error in the Supreme Court of Texas. Under rule 374 of the Texas Rules of Civil Procedure it is necessary that a position be included in a statement of points in the brief before the court of civil appeals. See *State* v. *Bilbo,* 392 S.W. 2d 121 (Tex. 1965). Petitioner failed to include its so-called federal constitutional argument in this statement of points. Additionally, the Supreme Court of Texas will not consider points of error that were not raised in the Motion for Rehearing before the Court of Civil Appeals. *E.g., East Texas Motor Freight Lines* v. *Loftis,* 148 Tex. 242, 223 S.W. 2d 613 (1949); *Kimbrough* v. *Walling,* 371 S.W. 2d 691 (Tex. 1963). Having failed to comply with state procedural rules for the raising of federal questions petitioner cannot now assert this so-called federal question by way of petition for writ of certiorari. *E.g., John* v. *Pollin,* 231 U.S. 583, 585 (1913). By order of July 10, 1968, the Supreme Court of Texas refused petitioner's application for writ of error, noting that there was no reversible error. As previously noted, petitioner first raised federal constitutional questions in its First Amendment to Application for Writ of Error in the Supreme Court of Texas. The order of the Superme Court of Texas permitting amendment was entered without opinion in the same order in which the Supreme Court overruled petitioner's Motion for Rehearing of Application for Writ of Error and Application as Amended. (Order of Supreme Court of Texas dated July 24, 1968). Where a federal question is initially raised in a petition or assignment of errors filed in the highest state court which refuses to consider any issue not presented to the lower courts, the jurisdiction of this Court cannot attach. *Bailey* v. *Anderson,* 326 U.S. 203, 206-7 (1945). Only if the highest state court actually considers and disposes of the question so raised can this Court review the opinion. Raising the federal question for the first time in a petition for rehearing addressed to the highest state

court is insufficient unless the court actually entertains the petition and expressly decides the question *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 128 (1945). To constitute a reviewable judgment under such circumstances, the order denying a petition for rehearing must be more than a cursory recitation that the petition was denied. *Consolidated Turnpike Co.* v. *Norfolk & O.V. Ry.*, 228 U.S. 326, 333-4 (1913).

Ignoring the fact that petitioner did not timely raise and preserve its federal constitutional contentions, the questions presented by petitioner may be expressed as follows:

QUESTIONS PRESENTED

1. Whether the Texas courts deprived petitioner of its property without due process of law by holding that petitioner's excavations must be limited in such a manner as to permit respondent to reasonably utilize its easement rights?

2. Whether petitioner was deprived of equal protection of the law by the Texas courts' holdings that the correlative rights of an easement owner and the owner of a tract of land burdened by easements are not equivalent.

Petitioner's third and fourth questions may be expressed in a single question:

3. Whether the Texas courts denied petitioner due process of law by holding (1) that petitioner had waived an affirmative defense by failing to plead it and (2) by holding that the affirmative defense issue had not been tried by express or implied consent.

STATEMENT OF THE CASE

Respondent, Southwestern Bell Telephone Company (Southwestern Bell) is the owner of two easements that burden a 17.584 acre tract of land located on the east bank of the San Jacinto River in Harris County, Texas. The easements were acquired by Southwestern Bell by written grants in 1945 and 1954. Pursuant to each of these easements respondent has installed various conduits, cables, and equipment. The equipment is an integral part of the communications system between Houston, Texas, and Beaumont, Port Arthur, and Orange, Texas.

In 1966 petitioner, San Jacinto Sand Company, acquired, for approximately $25,000, the 17.584 acre tract that was burdened by respondents' two easements. Petitioner acquired the land with actual and constructive knowledge of the two easements and the equipment placed pursuant to them.

The composition of the surface of the 17.584 acre tract is largely common sand and gravel. In November, 1966, petitioner began excavating sand and gravel from the tract in such a manner that the respondent's easements and equipment would have been destroyed. Petitioner's excavation operations were discontinued as the result of a temporary restraining order obtained by respondent.

The controling question in the case concerned the correlative rights, under Texas law, of an easement owner and the owner of the servient, burdened estate. Relying upon well-settled principles of Texas property law the trial court and court of civil appeals held that the respondent was entitled to the undisturbed use of its property for the purposes of the easements and that petitioner would not be permitted to excavate in such a manner that would injure or destroy the easements. The Supreme Court of Texas

ruled that there was no reversible error committed by the trial court or the court of civil appeals.

The proceedings below involved nothing more than a controversy between two owners of interests in land. Three Texas courts have passed on the controlling questions of the Texas law of easements. Petitioner now seeks to convert an ordinary state property law case into one involving federal constitutional issues. An examination of petitioner's reasons for granting the writ reveals that there are no constitutional issues involved in this case. Petitioner is simply complaining of the application by the Texas courts of traditional doctrines of property and procedural law.

REASONS FOR DENYING THE WRIT

1. *Petitioner's First Reason For Granting The Writ*

The courts below held that petitioner could not destroy respondent's easements and equipment placed pursuant to the easements. As a result of this holding, presumably, petitioner will not be able to recover as much sand and gravel as it could if it were not required to avoid destroying the easements. The courts' determination was based on the universally accepted rule of property law that the easement is the dominant estate and that the burdened land is the servient estate. Reinstatement of Property — Servitudes §§ 455, 456 (1944). Under this rule the easement owner is entitled to the reasonable enjoyment of its easements and the owner of the servient estate may not act inconsistently therewith. *E.g., Gulfview Courts* v. *Galveston County,* 150 S.W. 2d 872 (Tex. Civ. App. 1941, *writ ref'd*); *Street* v. *Sinclair Pipeline Co.,* 386 S.W. 2d 350, 352 (Tex. Civ. App. 1965, no writ); *Hayes* v. *State,* 342 S.W. 2d 167 (Tex. Civ. App. 1960, writ ref'd n.r.e.); *Phillips Pipe Line Co.* v. *Razo,* 420 S.W. 2d 691 (Tex. Sup.

1967). In reaching their decisions the Texas courts often referred to respondent's easements being entitled to lateral support. Petitioner argues that the judgments of the courts below went beyond the protection of lateral support and protected respondent's easements from the action of the adjacent San Jacinto River. Without regard to whether the action of the river should be taken into consideration in determining lateral support, petitioner's position ignores the rationale of the decision of the courts below. These courts simply held that respondent is entitled to the reasonable enjoyment of its interests in land and that petitioner, who had actual and constructive notice of these interests when it acquired the burdened property, may not destroy them. As the court of civil appeals opinion makes clear, this holding is required by universally accepted principles of easement law. (Petition at 12a-14a) Petitioner's constitutional argument begs the question. If, as the courts below held, respondent's easements are entitled to support and protection from the acts of the owner of the burdened tract, nothing has been "taken." Following the well-settled principles of easement law, the courts below held that respondent acquired this right to support or protection as one of the rights it acquired when it secured its easements.

Petitioner is arguing that if the substantive principle of state law by which it lost should be different, it was deprived of property without due process of law. Under this theory there is a federal constitutional question concerning the taking of property without due process of law in every case where one party is economically adversely affected by the decision. Every question of state law would involve a federal constitutional issue. Petitioner is simply dissatisfied with the results of this litigation. Clearly petitioner's approach must be rejected. *E.g., Berea*

College v. *Kentucky*, 211 U.S. 45, 53 (1908); *Leathe* v. *Thomas*, 207 U.S. 93 (1907).

2. *Petitioner's Second Reason For Granting The Writ*

The Supreme Court of Texas has held that the easement owner, in the reasonable enjoyment of its easement rights, may destroy the lateral support of the servient estate. *Williams* v. *Thompson*, 152 Tex. 270, 256 S.W. 2d 399 (1953). Petitioner argues that the failure of the Texas courts to adopt the converse of this holding, *i.e.*, the servient estate owes no duty of lateral support to the dominant estate, denied it equal protection of the law.

Clearly no constitutional issue is presented. Petitioner's position simply ignores the basis of the distinction between the two situations. Under Texas law as well as that of all other jurisdictions the easement constitutes the dominant estate and the burdened land the servient estate. The correlative rights of the owners of these interests in land are not equal. This was the holding of the Supreme Court in *Williams*.[2] As the dominant estate, the easement owner may destroy the lateral support of the servient estate if this is reasonably necessary to the enjoyment of the easement. Conversely, the owner of the servient estate may not injure the support of the easement if this is necessary to the reasonable enjoyment of the easement. This typical application of well-settled principles of property law does not raise constitutional questions.

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[2] The court in *Williams* also relied on the fact that the complaining landowners acquired the burdened property with constructive notice of the easements and took subject thereto. In the present case petitioner also acquired the property with actual and constructive notice of respondent's easements and equipment.

3. *Petitioner's Third and Fourth Reasons For Granting the Writ*

Over five months after the trial of the case petitioner argued to the trial court that the respondent had abandoned its easements. Petitioner had not pled this defense and did not offer an amendment to its pleadings. The court of civil appeals held that the abandonment issue had been waived under rule 94 of the Texas Rules of Civil Procedure since the issue was an affirmative defense that should have been set forth affirmatively in petitioner's pleading. In this respect rule 94 is identical to rule 8(c) of the Federal Rules of Civil Procedure. Petitioner would also have waived the defense under the federal rule. *E.g., Oederkerk* v. *Muncie Gear Works,* 179 F. 2d 829 (7th Cir. 1950).

The court of civil appeals reviewed the record of the proceedings before the trial court and held that the issue had not been tried by the express or implied consent of the parties under rule 67 of the Texas Rules of Civil Procedure. Rule 67 is substantially identical to rule 15(b) of the Federal Rules of Civil Procedure. In reaching this conclusion, the court found, *inter alia,* that the primary evidence relied on by petitioner did not even relate to the abandonment of the easements.

Highly dissatisfied with these rulings of the Texas courts, petitioner makes the nebulous contention that it has been deprived of its constitutional rights. The decisions of the courts below were the products of the correct employment of procedural rules that govern all federal litigation and most state litigation. In no respect are constitutional issues raised.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, DAVID T. SEARLS, one of the Attorneys for Respondent herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 13th day of November, 1968, I served copies of the foregoing Brief for Respondent in Opposition by mailing copies thereof to counsel for Petitioner, San Jacinto Sand Company, Inc.

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David T. Searls